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No. 91-168

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN W. RUTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether 18 U.S.C. 3742(b) requires the government to furnish written certification—no later than the filing of a notice of appeal—that the Solicitor General has authorized an appeal of an otherwise final sentence.

2. Whether the possible impact of the defendant's imprisonment on his employees warranted a downward departure from the range of imprisonment indicated by the Sentencing Guidelines to a term of probation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

United States v. *Hatchett*, 923 F.2d 369 (5th Cir. 1991)	7
United States v. *McHan*, 920 F.2d 244 (4th Cir. 1990)	7
United States v. *Prestemon*, 929 F.2d 1275 (8th Cir. 1991)	6-7
United States v. *Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), cert. denied, 493 U.S. 1084 (1990)	7
United States v. *Ryan*, 866 F.2d 604 (3d Cir. 1989)	7
United States v. *Smith*, 910 F.2d 326 (6th Cir. 1990)	4, 5, 6

Statutes and regulations:

Crime Control Act of 1990, Pub. L. No. 101-647, § 3501, 104 Stat. 4921	6
18 U.S.C. 3742(b)	6
18 U.S.C. 3742	6
18 U.S.C. 3742(b) (1988)	3, 5
28 U.S.C. 994(d)	6
28 U.S.C. 994(e)	7
33 U.S.C. 1319(c)(2)(A)	2
United States Sentencing Commission, *Sentencing Guidelines Manual* (1990):	
§ 5H1.6	8
§ 5H1.10	4

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A3-A11, is reported at 932 F.2d 1155. The district court's sentencing order, Pet. App. A12-A16, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1991. The petition for a writ of certiorari was filed on July 24, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a plea of guilty, in the United States District Court for the Northern District of

Ohio, to 18 counts of intentionally violating the national pretreatment standards of the Clean Water Act, in violation of 33 U.S.C. 1319(c)(2)(A). The district court sentenced petitioner to five years' probation, including the condition that he perform 1,000 hours of community service, and ordered him to pay a fine of $90,900. On the government's appeal, the court of appeals reversed the district court's sentencing order and remanded for resentencing. Pet. App. A3-A11.

1. Petitioner was a part owner and chief executive officer of the Finishing Corporation of America (FCA), a metal finishing plant in Campbell, Ohio. FCA discharged chemical waste into a sewer line connected to the Campbell Waste Water Treatment Plant (CWWTP). The CWWTP, in turn, discharges into the Mahoning River, which provides drinking water for several communities downstream of the treatment plant. Pet. App. A4 & n.1.

In 1986 and 1987, chemical waste water from FCA killed bacteria in the treatment plant. CWWTP notified petitioner of the effects of its discharges, but an attempt by petitioner and FCA's plant manager to solve the problem failed. In 1988, CWWTP documented 18 additional illegal discharges of chemical waste by FCA into the treatment plant. Two of those discharges caused chemical burns to a CWWTP employee who attempted to take samples of the water entering the treatment plant. Even though petitioner was aware of the discharges, he made no effort to prevent further releases. Petitioner ultimately agreed to close FCA, but at least one more discharge occurred after petitioner closed the plant. Pet. App. A4-A5.

2. After accepting petitioner's plea of guilty, the district court ordered the probation officer to prepare

a presentence report. The probation officer assigned petitioner an offense level of 18 and a criminal history category of I.[1] The district court accepted the probation officer's factual premises and calculations, but it departed downward to the sentencing range for offense level 6 and criminal history category I. Pet. App. A15. The court explained: "this defendant has a business employing some people and [imprisonment] may put them out of work." *Id.* at A8. The business to which the court referred is Viking Manufacturing Company, a separate entity from FCA. *Id.* at A6. The district court entered its judgment of sentence on March 16, 1990. *Id.* at A21.

3. On April 12, 1990, the Solicitor General authorized an appeal of that judgment. On April 13, the United States Attorney filed a notice of appeal. On April 17, the Solicitor General signed a written authorization indicating that he had previously authorized an appeal on April 12. On April 19, the government furnished petitioner a copy of the written authorization. Pet. App. A21.

Petitioner moved to dismiss the government's appeal, arguing that 18 U.S.C. 3742(b) required the Solic-

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[1] The probation officer calculated the offense level as follows:

> (1) Base offense level of eight (8) for mishandling of hazardous or toxic substances, under U.S.S.G. § 2Q1.2(a).
>
> (2) Increase by six (6) levels, for repetitive discharge, under U.S.S.G. § 2Q1.2(b)(1)(A).
>
> (3) Increase by four (4) levels, for disruption of a public utility, under U.S.S.G. § 2Q1.2(b)(3).
>
> (4) Increase by two (2) levels, for playing a leadership role in the activity, under U.S.S.G. § 3B1.1(c).
>
> (5) Decrease by two (2) levels, for acceptance of responsibility, under U.S.S.G. § 3E1.1(a).

Pet. App. A6.

itor General's written authorization to accompany the notice of appeal. The court of appeals denied petitioner's motion. Although that court had exercised its supervisory power to require the government to provide written proof that appeal had been authorized no later than the filing of its opening brief, see *United States* v. *Smith*, 910 F.2d 326 (6th Cir. 1990), it noted that its rule, which was prospective, Pet. App. A21, did not apply to this case. The court then concluded that it had "jurisdiction over the appeal * * * despite the government's belated submission of certification of written approval of the Solicitor General." *Id.* at A7 n.5.

On the merits, the court of appeals reversed the district court's sentencing determination and remanded for resentencing. Pet. App. A11. It reasoned that petitioner's status as a business owner was not a permissible basis for a downward departure. "The guidelines specifically state that a defendant's socio-economic status is not relevant in the determination of a sentence." *Id.* at A8 (citing Sentencing Guidelines § 5H1.10). The court further concluded that the impact of petitioner's incarceration on his employees did not distinguish petitioner from other polluters since "[t]he very nature of the crime dictates that many defendants will likely be employers, whose imprisonment may potentially impose hardship upon their employees and families." Pet. App. A9. "In sum, [petitioner's] status as a business owner simply does not distinguish his case from the 'mine-run' of cases involving the discharge of prohibited effluents into the environment, and is not a legally sufficient basis for downward departure." *Ibid.*

ARGUMENT

1. Petitioner's first specification of error—that the Solicitor General did not authorize an appeal before the U.S. Attorney filed a notice of appeal—rests on an erroneous factual premise. The court of appeals found, Pet. App. A21, and petitioner does not dispute, that the Solicitor General authorized an appeal of his sentence on April 12, 1990, the day before the U.S. Attorney filed the notice of appeal in his case. Although it is true that the Solicitor General did not sign the document confirming his authorization until April 17, the statute that was then applicable to government appeals of sentences required only "the personal approval of the Attorney General or the Solicitor General," 18 U.S.C. 3742(b) (1988); it did not require that such approval be in writing. Thus, petitioner is simply wrong when he asserts that the government "missed a deadline" and effected a "retroactive appeal," Pet. 11, 12, because nothing in the then-applicable version of the statute, or in its legislative history, supports petitioner's suggestion (Pet. 12) that written approval had to precede the filing of the notice of appeal.

In *United States* v. *Smith*, 910 F.2d at 328, the Sixth Circuit required that the government furnish evidence of the Solicitor General's written authorization to appeal no later than the filing of the government's brief, and that the Solicitor General's authorization be dated no later than the day on which the notice of appeal was filed. But that decision confirmed that "proof of the personal approval [of the Solicitor General] is not of jurisdictional dimensions in the sense that a timely notice of appeal in a criminal case is jurisdictional." *Ibid.* The filing requirement came not from 18 U.S.C. 3742(b), but from the court of appeals' "exercise of its supervisory authority," prospectively.

910 F.2d at 328. Because *Smith* was issued after the government filed its notice of appeal in this case, the supervisory rule in *Smith* was not applicable to this case. Moreover, in light of the fact that the rule was not jurisdictional or otherwise dictated by the statute, it was entirely appropriate for the court to enforce its rule prospectively and to conclude that the certification of written approval was sufficient in this case. Pet. App. A21.

In any event, Congress amended 18 U.S.C. 3742 as part of the Crime Control Act of 1990, Pub. L. No. 101-647, § 3501, 104 Stat. 4921, to eliminate any requirement that the Solicitor General authorize an appeal prior to the filing of a notice of appeal. As amended, 18 U.S.C. 3742(b) provides that the government may file a notice of appeal in the district court for review of a sentence without the Solicitor General's approval, but that the government "may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." That statute solves the timing problem that had resulted in the need for oral authorizations to appeal. The first question presented by the petition is therefore of no continuing importance.

2. The difficulty petitioner may face running his business from prison (and the consequent effect on his employees) is not a permissible basis for the district court to depart downward from the range of sentences prescribed by the Sentencing Guidelines. The court of appeals held, Pet. App. A8-A9, and petitioner apparently concedes, Pet. 13, that his status as a businessman does not warrant a downward departure. That concession accords with the statute authorizing promulgation of the Guidelines, 28 U.S.C. 994(d) (Guidelines and policy statements must be "entirely

neutral as to the * * * socioeconomic status of offenders"), and the uniform view of the courts of appeals, see, *e.g.*, *United States* v. *Prestemon*, 929 F.2d 1275 (8th Cir. 1991); *United States* v. *Hatchett*, 923 F.2d 369 (5th Cir. 1991); *United States* v. *McHan*, 920 F.2d 244 (4th Cir. 1990).

The petition (Pet. 13) attempts to recast the district court's special treatment as a favor to petitioner's employees rather than to himself. But no court of appeals has upheld a downward departure because of a defendant's responsibilities as an employer, and there is no authority to do so.[2] As the Fourth Circuit explained in *McHan*, 920 F.2d at 247, the Guidelines "rest sentences upon the offense committed, not upon the offender":

> [O]f the fifteen grounds for departure listed in § 5K2.0, p.s., et seq., not a single one looks to characteristics of the defendant: ten factors examine the specific criminal conduct and the resulting harm, and five relate to the defendant's mental capacity or motive at the time of the conduct. * * * The Guidelines clearly eschew consideration of personal characteristics in their attempt to relate sentences to a defendant's actual criminal conduct.

Accordingly, a district court may not ordinarily depart downward to mitigate the impact of imprisonment on a defendant's family. See 28 U.S.C. 994(e) (Guidelines should "reflect the general inappropri-

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[2] The two cases on which petitioner relies (Pet. 14), *United States* v. *Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), cert. denied, 493 U.S. 1084 (1990), and *United States* v. *Ryan*, 866 F.2d 604 (3d Cir. 1989), involved upward departures from the Guidelines range for persons convicted of drug offenses. They shed no light on the propriety of downward departures based on the defendant's management of a business.

ateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."); Sentencing Guidelines § 5H1.6.[3] By the same token, a court may not justify a downward departure simply because a term of imprisonment may have an adverse impact on the defendant's ability to fulfill even less immediate responsibilities, such as his obligations to his employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Guidelines § 5H1.6 states:

Family Ties and Responsibilities, and Community Ties (Policy Statement)

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in determination of the length and conditions of supervision.